IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

PEDRO PEREA, *et al*,
Appellants.
vs.
GEORGE W. HARRISON,
Appellee.
No. —

BRIEF FOR APPELLANTS.

Statement of the Case.

This is a cross-appeal taken by the appellants from the same decree of the supreme court of the Territory of New Mexico, from which the original appeal is prosecuted by the appellee in this case, the original appeal being case No. 113 of this term calendar. The trial court found many of the allegations of the bill in favor of these appellants and rendered a decree which taxed all of the costs of the litigation including a master's fee of one thousand dollars against the appellee. On appeal to the supreme court of the Territory, that court modified the decree of the trial court so as to make it more favorable to the appellee, although it found the facts

much more strongly against him and from this decree the appellants prayed and were granted a cross-appeal. The statement of the case on the original appeal contains all that is necessary to a proper understanding of the questions sought to be presented by the cross-appeal except in the following particulars. The findings of fact upon which this cross-appeal is prosecuted are as follows:

I.

That Jose L. Perea died about the 31st day of April, A. D. 1883, and left Guadalupe Perea (now Guadalupe Perea de Harrison), his widow, and Jose Leandro Perea, Segundo, son of said Jose and Guadalupe; and also Jose L. Perea, Benecio F. Perea, Mariano Perea, Jacobo Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Josefa Perea de Castsllo, Filomena Perea de Otero, Barbara Perea de Yrissarri, Cesaria Perea de Hubbell, Jesus M. Perea, and the complainant, Pedro Pera, the last *thirteen* of whom were children of Jose L. Perea by a former wife.

II.

That on the 23rd day of July, 1884, Guadalupe Perea (who afterward intermarried with the defendant, George W. Harrison) was duly appointed guardian of Jose Leandro Perea, Segundo, and as such guardian became possessed of all the assets and property of the said Jose Leandro which he inherited from his deceased father.

IV.

That the defendant George W. Harrison married the said Guadalupe Perea, widow as aforesaid, on the second day of September, 1895.

V.

That immediately after the intermarriage of the defendant George W. Harrison and the said

Guadalupe Perea the said George W. Harrison took charge and control of the affairs of the said Guadalupe Perea, including the assets of the said minor, Jose L. Perea; that he reduced the assets and property to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of financial decree in the case in the district court he retained, subject to his individual control, all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

VI.

That Jose Leandro Perea, Segundo, died on the 25th day of August, 1887, being then a minor about eight years of age, and that at the time of the death of said minor he owed no debts, and there were no charges against his estate except funeral expenses and the expenses of his last illness and certain claims for his maintenance by his said guardian.

VII.

That Guadalupe Perea de Harrison and Pedro Perea were duly appointed joint administrators of the estate of Jose Leandro Perea, Segundo, by the probate court of Bernalillo County on the fifth day of September, 1887, and the said Pedro Perea qualified as such administrator on the first day of October, 1887, and the said Guadalupe Perea de Harrison qualified as such administrator on the ninth day of October, 1887.

VIII.

That after the death of the said Jose Leandro Perea, Segundo, until the filing of the bill of complaint in this cause, Guadalupe Perea de Harrison during her lifetime and George W. Harrison after her death claimed to hold the assets of the estate of the said Jose L. Perea, Segundo, not as administrator, upon the pretense that there could be no distribution of

such assets, until the final account of Guadalupe Perea de Harrison as guardian was settled by the probate court.

IX.

That George W. Harrison (having charge of all the assets of the said ward) in the name of his said wife, Guadalupe de Perea de Haraison, made sundry reports to the said probate court as to the condition of the said estate, some containing false entries to her advantage, and together obstructing distribution among the heirs.

X.

That on the 20th day of October, 1889, Guadalupe Perea de Harrison died, and on the sixth of January, 1890, George W. Harrison was duly appointed administrator of the said Guadalupe Perea de Harrison, and during all of the period between the death of the said Guadalupe Perea de Harrison and his appointment as such administrator he was in possession of the assets of the said Jose L. Perea, Segundo, deceased, with full power (knowledge) of their trust character, and wrongfully refused to pay over the same to Pedro Perea who was the sole surviving administrator of Jose Leandro Perea, Segundo, and entitled to the custody thereof.

XII.

That the defendant, George W. Harrison, had in his possession and was liable to the complainant on the day of the rendition of the final decree herein by this court, the sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents, which was the total amount of moneys for which he is liable, as hereinbefore set out, with interest thereon at six per cent per annum, after allowing all credits to which he or the said Guadalupe Perea de Harrison was entitled.

XV.

That the said Guadalupe Perea de Harrison in her lifetime failed to keep correct accounts of the assets of Jose Leandro Perea, Segundo, which came into her possession, and that the said George W. Harrison also failed to keep correct accounts of his dealings with the said assets.

XVI.

That George W. Harrison wilfully obstructed the distribution of the assets of the estate of Jose Leandro Perea, Segundo, and by his misconduct rendered it necessary that the complainant should obtain possession of the assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the said George W. Harrison.

These facts being conclusive upon this court, the contention is that the decree of the supreme court of the Territory is erroneous in the following particulars:

(*a*) That the distribution should have been to the administrator of the deceased mother one-half, and to the twelve half brothers and sisters of the deceased having the same father the other half, excluding Grover William Harrison as an heir.

(*b*) That appellee, George W. Harrison, as administrator of his deceased wife, should have been decreed to be entitled to one-half only of the fund.

(*c*) That the said Harrison should have been decreed to pay all the costs, including the solicitor's fee, out of his private estate.

(*d*) That in ascertaining the amount in his hands, and for which he was liable, he should have been charged interest at the rate of twelve per cent. per annum—the highest rate allowed by the laws of the Ter-

ritory of New Mexico, and that said interest should have been compounded annually.

On the cross-appeal, errors are assigned as follows:

I.

The said court erred in failing to decree the distribution of the fund upon the basis of one half to the estate of Mrs. Harrison and one half of the remainder to the twelve surviving children of Jose Leandro Perea, to-wit: Jose L. Perea, Benicio F. Perea, Mariano Perea, Jacobo Perea, Jesus M. Perea, Pedro Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Barbara Perea de Yrsarri, Filomena Perea de Otero, Cesaria Perea de Hubbell and Josefa Perea de Castillo, or one twenty-fourth part of the fund to each of said last named twelve persons.

II.

The said court erred in decreeing that George W. Harrison be permitted to retain in his possession seventeen twenty-sixths of the fund, while the findings of the court warrant a decree permitting him to retain no more than one half of said fund.

III.

The said court erred in failing to decree all of the costs of said litigation including solicitor's fees to be paid by the appellant, George W. Harrison, and in decreeing the payment of the same out of the fund.

IV.

The court erred in failing to charge the said George W. Harrison with interest at the rate of 12 per cent. per annum, the highest rate allowed by the laws of New Mexico, on the fund found to be in his hands, and to compound said interest annually in stating the amount for which said Harrison was liable.

The supreme court of the Territory, apparently following the lead of the court below, which held that Grover William Harrison was an heir-at-law of his

half brother, Jose L. Perea, Second, distributed this estate on the basis of one half to the widow, which appellant, Harrison, as her administrator was permitted to retain, and divided the other half, apparently, into thirteen parts. I say, apparently, for the finding of the court on this point would seem to indicate a different intention, although the decree as drawn and signed gives one twenty-sixth part to each of eight heirs, leaves seventeen twenty-sixths in the possession of Harrison and leaves one twenty-sixth undisposed of, evidently by mere clerical mistake. It is only fair to say that the court below found that Harrison had succeeded to the rights of three of the heirs, to-wit: Filomena Perea de Otero, Jesus M. Perea and Cesaria Perea de Hubbell, and the failure of the supreme court to so find is a mere oversight, which appellee is entirely willing to have corrected by this court, if it may be done by his consent. He insists, however, if this is done that he shall be properly acquitted of all further liability of or such part of the fund as is left by this court's decree in Harrison's hands. That this is a mistake is quite obvious. The first finding of fact is as follows:

That Jose L. Perea died about the 21st day of April, A. D. 1883, and left Guadalupe Perea (now Guadalupe Perea de Harrison), his widow, and Jose Leandro Perea, Segundo, son of said Jose and Guadalupe; and also Jose L. Perea, Benicio F. Perea, Mariano Perea, Jacobo Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Josefa Perea de Castillo, Filomena Perea de Otero, Barbara Perea de Yrisarri, Cesaria Perea de Hubbell, Jesus M. Perea, and the complainant, Pedro Perea, the last *thirteen* of whom were children of Jose L. Perea by a former wife.

While it is there said that the last thirteen of whom were children of Jose L. Perea by a former wife, but twelve names appear and the whole record shows that

he had but twelve children by his first wife. I insist that Guadalupe P. Harrison inherited one-half of this estate and the twelve children by the first wife the other half, and that it should have been so distributed.

I.

The distribution made by the decree is erroneous to the prejudice of the cross appellant.

The only reasonable explanation I can find of this error, is that the district court held that, Grover William Harrison, who was the son of Guadalupe P. Harrison and her husband, George W. Harrison, and thus a half brother of the deceased, was entitled to inherit with the children of Jose L. Perea by his first wife, but if this is the explanation, such holding is clearly erroneous. The supreme court of the territory does not mention Grover William Harrison, as an heir, and yet distributes the estate as if there were thirteen half brothers and sisters and a mother. The statute of the Territory in force at the death of the decedent and under which the distribution must be made is as follows. Part of Chapter XXXII of Laws of 1887:

Sec. 3. If any intestate shall die without lawful issue or their descendants alive, one-half of the estate shall go to the father and mother of such intestate, as joint tenants, or if either be dead, to the survivor, and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common.

Sec. 6. Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit: Provided, that on the failure of such kindred, other kindred of the half blood shall inherit as if they were of the whole blood.

At the time of the death of Guadalupe P. Harrison in October, 1889, the statute regulating descents and distributions, if deemed to be material, is as follows, being part of section 21 of chapter 90 of the laws of 1889:

Sec. 21. Sections 1410 to 1422, both inclusive, of the compiled laws of 1884, are repealed, and the following sections, bearing the same numbers respectively, are hereby substituted in place of said repealed sections:

Sec. 1810. The estate after having been inventoried and appraised as required by law, shall be divided and distributed as hereinafter provided, to-wit:

First. All property, both real and personal, brought into the marriage community by the surviving husband or wife, or acquired by him or her by inheritance, donation or legacy, shall constitute his or her separate estate, and shall be subject to the private debts of such survivor.

Second. All property, both real and personal, acquired by either the husband or wife during the existence of the marriage community, otherwise than as stated in the last preceding paragraph, shall constitute the acquest property, and shall be liable for the common debts.

Third. The separate estate of the surviving husband or wife shall remain the property of such survivor absolutely, and shall be set apart to such person without any charge thereon growing out of the estate, but subject only to his or her private debts; and in case any of the separate property of the wife has been reduced to possession or appropriated by the husband, or so commingled with his property or with the acquest property that it cannot be identified or separated then the just value thereof shall be set apart for the widow as a preferred claim, free of all encumbrances in connection with the estate, except in favor of bona fide creditors of the husband or of the marriage community, without notice of such claim.

Fourth. One half of the acquest property which re-

mains after the payment of the common debts of the marriage, shall be set apart to the surviving husband or wife absolutely.

Section 1411. Subject to the rights, charges and deductions hereinbefore provided, and to the payment of the debts of the decedent, the remainder of the acquest property and separate estate of the decedent shall constitute the body of the estate for descent and distribution, and may be disposed of by will, or in the absence of a will, shall descend as follows: .one-fourth thereof to the surviving husband or wife and the remainder in equal shares to the children of the decedent.

Thus it will be seen that three-fourths of the one-half of this estate passed on the death of Guadalupe P. Harrison to Grover William Harrison and the other fourth to George W. Harrison and as it appears that George W. Harrison had authority as administrator of Guadalupe P. Harrison to receive the portion of the estate inherited by his deceased wife, I insist that the decree of the supreme court of the Territory should be so modified as to require the said George W. Harrison to pay over to the cross appellant the entire fund less one-half, which as administrator of his deceased wife he is entitled to receive, and that the other half of the estate when paid over be distributed as follows:

To Jose L. Perea, one twenty-fourth.
To Benicio F. Perea, one twenty-fourth.
To Mariano Perea, one twentytfourth.
To Jacobo Perea, one twenty-fourth.
To Jesus M. Perea, one twenty-fourth.
To Pedro Perea, one twenty-fourth.
To Beatriz Perea de Armijo, one twenty-fourth.
To Soledad Perea de Castillo, one twenty-fourth.
To Barbara Perea de Yrisarri, one twenty-fourth.
To Filomena Perea de Otero, one twenty-fourth.
To Cesaria Perea de Hubbell, one twenty-fourth.
To Josefa Perea de Castillo, one twenty-fourth.

I do not object to having the modified decree so framed as to permit Harrison to retain the share of any one of the heirs to whose rights he has succeeded, upon the production of evidence of his right to receipt for the same, if he be entitled to do so, and executing to the cross-appellant a proper receipt for that portion of the fund. I think it quite clear, upon these findings of fact, that it was by a mere oversight that the decree of the supreme court of the territory was not rendered in the form for which I contend. It may be true that the trial court found that Grover William Harrison was an heir and so decreed, and it is also true that no cross-appeal was prayed from that decree, but the supreme court found that Grover William Harrison was not an heir, by finding who were the heirs and not mentioning him as one, and then distributed the estate as if he were an heir, and from that decree a cross-appeal is prosecuted.

The act of congress under which this case is reviewed here is as follows:

Sec. 2. That the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said supreme court have prescribed or may hereafter prescribe:

Provided, That on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and

transmitted to the supreme court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said supreme court heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal.

Sup. Rev. St. U. S. Vol. 1. page 7.

This statute has been so often construed by this court that it is hardly necessary to call attention to the cases in which it has been held that in such matters the question is, does the findings of fact taken as true, support the decree. I insist that the findings of fact do not support a decree dividing this estate into twenty-sixths.

Grayson v. Lynch, 163 U. S. 473.

Gildersleeve v. N. M. Min. Co., 161 U. S. 573.

Idaho Land Co. v. Bradbury, 132 U. S. 513.

San Pedro Co. v. U. S., 146 U. S. 130.

Smith v. Calc, 144 U. S. 525.

Mining Co. v. Machine Co., 151 U. S. 450.

Stringfellow v. Cain, 99 U. S. 610.

Gray v. Howe, 108 U. S. 12.

Zeckendorf v. Johnson, 123 U. S. 617.

Haws v. Victoria Mining Co., 160 U. S. 303

II.

The court should have decreed all of the costs of this proceeding, including solicitor's fees, against the appellant Harrison individually.

The supreme court of the territory found the following facts:

That immediately after the intermarriage of the defendant George W. Harrison and the said Guadalupe Perea the said George W. Harrison took charge and control of the affairs of the said Guadalupe Perea, including the assets of the said minor, Jose L. Perea; that he reduced the assets and property of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the district court he retained, subject to his individual control, all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

X.

That on the 20th day of October, 1889, Guadalupe Perea de Harrison died, and on the sixth of January, 1890, George W. Harrison was duly appointed administrator of the said Guadalupe Perea de Harrison, and during all of the period between the death of the said Guadalupe Perea de Harrison and his appointment as such administrator he was in possession of the assets of the said Jose L. Perea, Segundo, deceased, with full power (knowledge) of their trust character, and wrongfully refused to pay over the same to Pedro Perea who was the sole surviving administrator of Jose Leandro Perea, Segundo, and entitled to the custody thereof.

XII.

That the defendant, George W. Harrison, had in his possession and was liable to the complainant on the day of the rendition of the final decree herein by this court, the sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents, which was the total amount of moneys for which he is

liable, as hereinbefore set out, with interest thereon at six per cent per annum, after allowing all credits to which he or the said Guadalupe Perea de Harrison was entitled.

XV.

That the said Guadalupe Perea de Harrison in her lifetime failed to keep correct accounts of the assets of Jose Leandro Perea, Segundo, which came into her possession, and that the said George W. Harrison also failed to keep correct accounts of his dealings with the said assets.

XVI.

That George W. Harrison wilfully obstructed the distribution of the assets of the estate of Jose Leandro Perea, Segundo, and by his misconduct rendered it necessary that the complainant should obtain possession of the assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the said George W. Harrison.

The authorities conclusively establish the proposition that a trustee *ex-malefício* is subject to the same penalties as a trustee regularly appointed, and it only remains to determine what those penalties are, as against a trustee who fails to keep correct accounts, makes false reports and by his wrongful conduct renders litigation necessary for the preservation of a trust fund.

Upon the authorities it is clear that the trustee and not the fund should bear the burden of costs thus rendered necessary. Mr. Daniel says:

If a suit is occasioned by the misconduct or obstiancy of a trustee, he may be compelled to pay the whole costs of it. Thus, where a bill

for specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, Lord Thurlow was of opinion that the trustee ought to pay all the costs of the suit, and accordingly directed the plaintiff to pay to the other defendants all their costs of the suit, and to recover them over, together with his own costs, from the defendant, the trustee.

In the case last referred to, the Registrar appears to have doubted whether, according to the practice of the court, the plaintiff, having been successful against the other defendants, and obtained against them a decree for specific performance, could, in point of form, be ordered to pay them their costs; but the Lord Chancellor thought that the decree was correct, according to the course of the court. In fact under ordinary circumstances, no other method exists, by which a defendant, who has by his conduct occasioned the suit, can be made to pay the whole costs of it: for the delinquent defendant cannot be decreed to pay the costs of a co-defendant to that defendant himself, as that would in effect be a decree between co-defendants. The only method, therefore, of effecting the object of compelling the delinquent defendant to pay the costs of the other defendant, is to order the plaintiff to pay them, and then permit him to receive them again from the defendant, whose delinquency has given rise to the litigation.

2 Dan. Chy. Pl. & Pr. 5 Am. Ed. 1406.

In a New Jersey case, it was said by the ordinary delivering the opinion of the court:

The court were right in charging the executors, individually, with all the costs of the suit. The evidence in the case and the whole history of the case, creates the belief that most of the difficulty in the case has been occasioned by the

conduct of one of the executors. And since the filing of the account, with a large amount of funds in their hands, they have permitted great and unwarrantable delay to occur in the final settlement. It is a mistaken idea that executors have acquitted themselves of their duty by filing their account in the orphans' court, and then permitting it to slumber, or to draw its slow length through the courts until all the law's delays are exhausted, or till they are goaded to action by the order of the court. It is clearly their duty, not only to exhibit their account for allowance, but to use diligence in bringing it to a final settlement. They are often trustee for widows and minors, or absent persons and others, whose rights are unrepresented. It is an unjustifiable abuse of their trust to make the law's delays a pretext for holding the fund of the estate in their hands, often for their own benefit and greatly to the prejudice of those interested. I think the decision of the court in this regard eminently just as well as lawful, and calculated to effect a salutary check upon a prevalent and gross abuse.

Excr. of Egerton v. Egerton, 17 N. J. Eq. 424

Penfield v. Bouch, 4 Hare 271.

Lyse v. Kingdon, 1 Collier, 184.

Hampshire v. Bradley, 2 Collier 34.

Warter v. Anderson, 11 Hare 301.

Executors of Egerton v. Egerton, 17 N. J. Eq. 419.

Lathrop v. Smalley's Executors, 23 N. J. Eq. 192.

Wabbass v. Armstrong, 10 N. J. Eq. 263.

Post v. Stephens, 13 N. J. Eq. 293.

In re Mathewson's estate, 40 N. Y. Sup. 140.

In re Bennet's estate, 42 N. Y. Sup. 674.
Atty. Gen. v. Alford, 4 DeG. M & G. 851.

III.

Interest at the highest rate allowed by law should have been charged against the appellant.

While this court cannot, on this record, re-examine the accounts of appellant, sufficient appears as to the method adopted by the supreme court of the Territory in stating the accounts against him to show affirmatively that the method was more favorable to him than the law warrants. The decree shows that the court computed interest on the decree of the district court from June 29th, 1893 to the 26th day of August, 1895, at the rate of six per cent per annum. It is true that there is nothing before this court which would authorize it to re-examine the account as stated by the master up to the 26th day of October, 1892, but there is enough in the record to show that the appellant has only been charged interest at the rate of six per cent per annum from this date and that this court should correct this error by directing that interest on the balance found by the master be charged at the rate of twelve per cent per annum from the date of the finding of the balance to the date of the decree in the supreme court of the Territory, and that the decree of that court should in turn bear interest at twelve per cent per annum. If this were done, the decree thus rendered would under the rules of this court bear interest at twelve per cent per annum until paid. The decree of the supreme court on this point is as follows:

"It appearing to the court that the special master in this cause found that on the 26th day of October,

1892, there was in the hands of the defendant, George W. Harrison, the sum of thirty thousand three hundred and sixty-one dollars and twenty-nine cents; that the court below in its decree found that on the date thereof the said sum, with interest calculated to the nineteenth day of June, 1893, the date of said decree, amounted to the sum of thirty-one thousand five hundred and forty-five dollars and thirty-two cents, it is found by this court that the said defendant, George W. Harrison should be charged with interest upon said sum up to this 26th day of August, 1895, amounting to the sum of forty-three hundred and twenty-four dollars and forty-five cents, and that therefore the said defendant is chargeable as of this date of the sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents.

The only statutes of the Territory which bear on this question are compiled as sections 1734, 1735, 1736 and 1737 of the Compiled Laws of 1884, as follows:

Sec. 1734. The rate of interest, in the absence of a written contract fixing a different rate, shall be six per cent per annum, in the following cases:

First—On money due by contract.

Second—On judgments and decrees for the payment of money when no other rate is expressed.

Third—On money received to the use of another, and retained without the owner's consent expressed or implied.

Fourth—On money due upon the settlement of matured accounts from the day the balance is ascertained.

Fifth—On money due upon open account, after six months from the date of the last item.

Sec. 1735. Judgments and decrees for the payment of money shall draw the same rate of interest with the contract on which they are rendered; and such rate if other than six per cent., shall be expressed in the judgment or decree, but no judgment or decree shall draw more than twelve per cent. interest.

Sec. 1736. In current or open accounts in commercial houses there shall not be collected more than six

per cent. interest thereon, six months after the delivery of the last article: Provided, that in written contracts for the payment of money, it shall not be legal to recover more than twelve per cent. interest per annum.

Sec. 1737. Any person, persons or corporation, who shall hereafter charge, collect, or receive from any person a higher rate of interest than twelve per cent. per annum, shall be guilty of a misdemeanor and upon conviction thereof before the district court or a justice of the peace, shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars, and such person, persons or corporations shall forfeit to the person of whom such interest was collected or received or to his executors, administrators or assigns, double the amount so collected or received upon any action brought for the recovery of the same within three years after such cause of action accrued.

It will be at once observed that there is nothing in this legislation, which can be construed as limiting the power of a court of chancery over a trustee who has wrongfully used trust funds for his own benefit, has failed to keep correct accounts, who has made false reports and who has obstructed the distribution of the trust fund, except the last sentence of section 1735. If the trial court had charged the appellant with interest at the rate of twelve per cent. per annum up to the time of the rendition of the decree in that court, it would certainly have been within the equity of the provisions of section 1735 and within the letter of the last sentence if it had provided that the decree should bear interest at twelve per cent. per annum. It may, however, be said in answer to this that interest is not charged to a trustee by way of punishment for breach of trust and that this court cannot examine the evidence in the court below and from it determine whether or not the appellant received interest on this money, and it may be that the evidence would show that he accounted for every penny of interest which he re-

ceived. But the supreme court found the following facts:

V.

That immediately after the intermarriage of the defendant, George W. Harrison, and the said Guadalupe Perea, the said George W. Harrison took charge and control of the affairs of the said Guadalupe Perea, including the assets of the said minor, Jose L. Perea; that he reduced the assets and property of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the district court he retained subject to his individual control all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

XV.

That the said Guadalupe Perea de Harrison in her lifetime failed to keep correct accounts of the assets of Jose Leandro Perea, Segundo, which came into her possession, and that the said George W. Harrison also failed to keep correct accounts of his dealings with the said assets.

XVI.

That George W. Harrison wilfully obstructed the distribution of the assets of the estate of Jose Leandro Perea, Segundo, and by his misconduct rendered it necessary that the complainant should obtain possession of the said assets by the institution of this suit, and that the necessity of this suit arose entirely out of the wrongful conduct of the said George W. Harrison.

And in the opinion of the court it is said:

The case went to a master who found all the material facts in favor of complainant and said master stated an account more favorable to the defendant than the facts justified, but we will not disturb his findings abundantly sustained by the evidence and the rules of law applicable to such cases.

I insist that upon the facts found the appellant is chargeable, as matter of law, with interest at the high-

est rate and that it was not a matter of discretion but was the imperative duty of the supreme court of the Territory to apply the law to the facts found and re-state the account on that basis. So long as the facts are doubtful or uncertain the court has a discretion to adjust charges of this charactsr upon an equitable basis, but when the supreme court found the facts stated in the three findings quoted, it made a case where the law fixed the defendant's liability at the highest rate of interest allowed by law, and it involved no disturbance of the master's findings for the court to so adjudge, while to do otherwise was and is to allow this appellant to profit by his own wrong. The legal principle here involved is well stated by the supreme court of Michigan as follows:

> The precise sum the *cestui que trust* should receive, and which the trustee should pay, is that which the former has lost by the failure of the latter to honestly and properly administer the trust. Where the trustee has misappropriated the fund, or neglected to invest it when he should, the *cestui que trust* will be presumed to have lost at least the lawful interest upon the same; and, if the fund has been so used that the accumulations in the hands of the trustee reach beyond the interest on the fund, the court will decree to him, as his loss, whatever may have been so received.
>
> If the trustee fails or refuses to account, he may be charged with the fund, and such accumulations thereon as the best management by the most successful business men would be likely to secure for it, as it will be presumed the trustee has received so much, or he would have reported his gains, and which will in such case be held the measure of the *cestui que trust's* loss. If such gains have been greater than the interest, or the interest compounded, it is given for the beneficiary, not on the ground that it would be presumed to earn a larger sum, but because the

court will not allow the trustee to take profit from his own wrong; and that, as between him and the beneficiary, the latter has the better right to the excess, the interest of no other person being involved therein. If, however, the trustee has shown an utter disregard for the interest of the beneficiary, and deliberately planned to absorb the trust fund by his fraudulent disposition of it to his use, and attempt to destroy or suppress the evidence of his management of the fund, and the profits he has received therefrom, and so far succeeds in his purpose that no one but himself can trace the fund or its accumulations, and when called upon to account he renders false and fictitious accounts, so defective as to be impossible of proper judicial investigation and adjudication, in such case, if the amount of the fund which he has used can be ascertained, he may be charged therewith, and the largest profits that can lawfully be made thereon by the most sagacious and expert business men in their management of money, even to the allowing of compound interest at the highest lawful rates, and making rests annually or semi-annually, if it shall appear just and equitable to the court, in securing to the *cestui que trust* the use of his property, of which he has been deprived. The law entitled him to all the accumulations of his property while in the trustee's hands, and, under the circumstances stated, when he refuses to account, it will be presumed he has received such accumulation, and that such amount is the beneficiary's loss, and court of equity may give it to him. Such sum is not awarded for the purposes of punishment or imposing a penalty on the trustee for his maladministration of the trusts. Courts of equity do not impose or enforce penalties, or punish parties for their wrongs in the administration of trusts, but only furnishes the adequate means of redress when the law fails so to do.

Perrin v. Lepper, 72 Mich. 554-5-6.

In another case the same court said:

It was in defendant's power for several years after suit was commenced, if not always, to show the exact profits of his business. His refusal to do so authorizes us to believe that he thought they would exceed anything that complainant could show. In our opinion, the commissioner placed the profits quite as low as the proofs would have warranted. We are strongly impressed with the belief that the defendant has profited by his contumacious silence. But as complainant has not appealed, we cannot enlarge the sum decreed. Compound interest was proper under the circumstances.

Heath v. Waters, 40 Mich. 472.

In the case of *Docker vs. Somes* (2 *Mylne & Keen, 664*) Lord Brougham, commenting on the English cases, which hold that interest at the legal rate is the full measure of the trustee's liability, unless it affirmatively appears that he has earned a greater amount through his wrongful use of trust funds, said:

Whenever a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the *cestui que trust*, whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though loss, if any must fall upon himself; yet, for every farthing of profit he may make shall be accountable to the trust estate.

Such being the undeniable principle of equity, such the rule by which breach of trust

is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that causes it; punished by charging all loss to the wrong-doer, while no profits can ever accrue to him—can the court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic. At first sight this seems grossly absurd, and some reflection is required to understand how the court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this: They could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult, where a great portion of the gains proceeded from skill or labor employed upon the capital. In cases of separate appropriations there was no such difficulty; as where land and stock had been bought and then sold again at a profit: and here, accordingly there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate.

This principal is undoubtedly attended with one advantage: it avoids the necessity of an in-

vestigation of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit be reached by the court, or even the most moderate rate of mercantile profit, that is the legal rate of interest, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest; and this without the least regard to the profits actually realized; for, in the most remarkable case in which this method has been resorted to, Raphael v. Boehm, (which indeed, is always cited to be doubted, if not disproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

But the principle objection which I have to the rule is founded upon its tendency to cripple the just power of this court in by far the most wholesome and indeed necessary exercises of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralyzed or shrunk up. The distinction, I will not say sanctioned, but pointed at by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5 per cent. on it: and

then they may pocket 15 or 20 per cent. by a successful adventure.

After quoting at some length from the opinion in Treves v. Townsend, 1 Bro. C. C. 384, his Lordship proceeds:

If the case shows, on the one hand, the impression to have been that the court would not go to the real amount of profits made, but only inquire as to these for the purpose of ascertaining whether more than the usual rate of 4 per cent. shall be allowed, limiting itself to the legal interest of 5 per cent., if so much has been made; it as clearly proves on the other hand, that there was no disposition to shrink from an inquiry, now represented as impossible, into the rate of profits, and the portion of them attributable to the trust fund. If, however, it were to be inferred from this case, that trust moneys used in the trustee's trade cannot be charged more than 4 per cent, unless more be made of them, the doctrine would be dangerous indeed. Lord Loughborough seems to have taken a far sounder view of the principles on which the court deals with breach of trust, when he charged 5 per cent. simply on account of the unjustifiable use of the money, and without any regard to the gains made by the malversation. When Lord Thurlow stated that 4 per cent. was the rate usually allowed, and that it was never to be exceeded but in a special case, he laid down the admitted rule; but a special case was here abundantly made, when it was shown that the assignee had allowed sixteen years to elapse before offering to make a dividend, and had, during that period, trafficked with the fund.

McKnight Excr. v. Walsh, 23 N. J. Eq. 146.

Same case, 24 N. J. Eq. 509.

Hook v. Payne, 14 Wall. 257.

Schieffelin v. Stewart, 1 John. Chy. 620.

Spear v. Tinkham, 2 Barb. Chy. 211.

Utica Ins. Co. v. Lynch, 11 Paige Chy. 524.

Estate of Clark, 53 Cal. 359.

Clarkson v. Depeyster, 1 Hopk. 424.

Vorhees v. Stoothoff, 11 N. J. Law, 152.

Barney v. Saunders, 16 How. 542.

Attorney Gen. v. Alvord, 4 DeG. M. & G. 851.

2 Story Eq. Juris, 1277.

1 Perry on Trusts, S. 471.

Lewin on Trusts, 261-3-4.

Hill on Trusts, Star Pages 372-5.

I respectfully submit that upon this cross-appeal, the decree of the supreme court of New Mexico should be modified as herein indicated.

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